

LINDA BUTLER,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

)
) No. CV-08-0153-CI
)
) ORDER DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND GRANTING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
)
)
)
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JURISDICTION

Plaintiff protectively filed for disability benefits (DIB) and Supplemental Security Income (SSI) on October 6, 2005. (Tr. 77.) She alleged disability due to a herniated disc, back and neck pain, hepatitis C related fatigue, and depression, with an onset date of August 15, 2005. (Tr. 69, 96-97.) Her claim was denied initially and on reconsideration. Plaintiff requested a hearing before an

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1 administrative law judge (ALJ), which was held on November 6, 2007,
2 before ALJ Hayward C. Reed. (Tr. 347, 368-99.) Plaintiff, who was
3 represented by counsel, and vocational expert Deborah LaPoint (VE)
4 testified. (Tr. 369.) The ALJ denied benefits on January 23, 2008,
5 and the Appeals Council denied review. (Tr. 15-24, 4-6.) The
6 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

7 **STATEMENT OF THE CASE**

8 The facts of the case are set forth in detail in the transcript
9 of proceedings, and are briefly summarized here. At the time of the
10 hearing, Plaintiff was 52 years old with an 11th grade education and
11 dental assistant certification. (Tr. 372.) Plaintiff has past work
12 experience as a casino hostess, electronics assembler, coin machine
13 service repair person, and gambling cashier. (Tr. 107.)

14 Plaintiff reported she lived alone, was unmarried, and has
15 three adult children. (Tr. 236.) She reported she was independent
16 in her activities of daily living and personal care. (*Id.*) She
17 testified she could lift 10 pounds, sit for 20-30 minutes, stand for
18 15 to 20 minutes, walk for 30 minutes, and sit at the computer for
19 short periods of time. She reported she was taking an on-line
20 university correspondence course from a seminary school. (Tr. 378-
21 79.) She testified she was terminated from her last job in 2005
22 for not following company rules. (Tr. 103, 375-76.) She stated she
23 could no longer work due to pain and fatigue. (Tr. 373.)

24 **ADMINISTRATIVE DECISION**

25 The ALJ found Plaintiff's date of last insured for DIB purposes
26 will be December 31, 2010. (Tr. 15.) At step one, ALJ Reed found
27 Plaintiff had not engaged in substantial gainful activity since the
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1 alleged onset date. (Tr. 17.) At step two, he found Plaintiff had
2 severe impairments of "degenerative disk disease of the cervical and
3 lumbar regions of the spine." (*Id.*) He concluded diagnosed
4 hepatitis C and mental impairments did not pose more than minimal
5 limitations on Plaintiff's ability to do work activities for at
6 least 12 continuous months and, therefore, they were not severe
7 impairments. (Tr. 17-18.) The ALJ determined at step three the
8 impairments, alone and in combination, did not meet or medically
9 equal one of the listed impairments in 20 C.F.R., Appendix 1,
10 Subpart P, Regulations No. 4 (Listings). (Tr. 20.) The ALJ found
11 Plaintiff's statements regarding her symptoms and limitations were
12 "not entirely credible to the extent that [they] would preclude all
13 work." (Tr. 22.) At step four, he determined Plaintiff could
14 perform light work, including her past relevant work as a casino
15 coin machine repairer, cashier and hostess, as generally and
16 actually performed. (Tr. 23.) He found Plaintiff was not under a
17 "disability" as defined by the Social Security Act at any time
18 through the date of his decision. (Tr. 27.)

19 STANDARD OF REVIEW

20 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
21 court set out the standard of review:

22 A district court's order upholding the Commissioner's
23 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
24 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
25 Commissioner may be reversed only if it is not supported
26 by substantial evidence or if it is based on legal error.
27 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
28 Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more

1 than one rational interpretation, the court may not
 2 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

3
 4 The ALJ is responsible for determining credibility,
 5 resolving conflicts in medical testimony, and resolving
 6 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 7 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
 8 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

8 SEQUENTIAL PROCESS

9 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 10 requirements necessary to establish disability:

11 Under the Social Security Act, individuals who are
 12 "under a disability" are eligible to receive benefits. 42
 13 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 14 medically determinable physical or mental impairment"
 15 which prevents one from engaging "in any substantial
 16 gainful activity" and is expected to result in death or
 17 last "for a continuous period of not less than 12 months."
 18 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 19 from "anatomical, physiological, or psychological
 20 abnormalities which are demonstrable by medically
 21 acceptable clinical and laboratory diagnostic techniques."
 42 U.S.C. § 423(d)(3). The Act also provides that a
 22 claimant will be eligible for benefits only if his
 23 impairments "are of such severity that he is not only
 24 unable to do his previous work but cannot, considering his
 25 age, education and work experience, engage in any other
 26 kind of substantial gainful work which exists in the
 27 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

21 In evaluating whether a claimant suffers from a
 22 disability, an ALJ must apply a five-step sequential
 23 inquiry addressing both components of the definition,
 24 until a question is answered affirmatively or negatively
 25 in such a way that an ultimate determination can be made.
 26 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 27 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and
 26 detailed objective medical reports of h[is] condition from
 27 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 404.1512(a)-(b), 404.1513(d)).

1 It is the role of the trier of fact, not this court, to resolve
2 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
3 supports more than one rational interpretation, the court may not
4 substitute its judgment for that of the Commissioner. *Tackett*, 180
5 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
6 Nevertheless, a decision supported by substantial evidence will
7 still be set aside if the proper legal standards were not applied in
8 weighing the evidence and making the decision. *Browner v. Secretary*
9 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
10 there is substantial evidence to support the administrative
11 findings, or if there is conflicting evidence that will support a
12 finding of either disability or non-disability, the finding of the
13 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
14 1230 (9th Cir. 1987).

15 ISSUES

16 The question is whether the ALJ's decision is supported by
17 substantial evidence and free of legal error. Plaintiff argues the
18 ALJ erred when he: (1) found her hepatitis C and mental impairments
19 were not severe; (2) rejected the opinions of examining psychologist
20 Mahlon Dalley, Ph.D.; (3) assessed her credibility and pain
21 complaints; and (4) failed to include all her limitations in the
22 hypothetical questions posed to the VE. (Ct. Rec. 14 at 10-19.)

23 DISCUSSION

24 A. Credibility

25 Plaintiff argues the ALJ's credibility findings were not
26 sufficient to reject her pain testimony. (Ct. Rec. 14 at 15.) When
27 the ALJ finds a claimant's statements as to the severity of
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1 impairments, pain and limitations are not credible, the ALJ must
2 make a credibility determination with findings sufficiently specific
3 to permit the court to conclude the ALJ did not arbitrarily
4 discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947,
5 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
6 (9th Cir. 1991) (en banc). If there is no affirmative evidence that
7 the claimant is malingering, the ALJ must provide "clear and
8 convincing" reasons for rejecting the claimant's allegations
9 regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d 715,
10 722 (9th Cir. 1998). The ALJ engages in a two-step analysis in
11 deciding whether to admit a claimant's subjective symptom testimony.
12 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).

13 Under the first step, the ALJ must find the claimant has
14 produced objective medical evidence of an underlying "impairment,"
15 and that the impairment, or combination of impairments, "could
16 reasonably be expected to produce pain or other symptoms." *Cotton*
17 *v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986). Once the *Cotton* test
18 is met, the ALJ must evaluate the credibility of the claimant. In
19 addition to ordinary techniques of credibility evaluation, the ALJ
20 may consider the following factors when weighing the claimant's
21 credibility: the claimant's reputation for truthfulness;
22 inconsistencies either in her allegations of limitations or between
23 her statements and conduct; daily activities and work record; and
24 testimony from physicians and third parties concerning the nature,
25 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
26 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair v. Bowen*, 885 F.2d
27 597 n.5 (9th Cir. 1989). The ALJ may also consider an unexplained
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1 failure to follow treatment recommendations and testimony by the
2 claimant "that appears less than candid." *Tommasetti v. Astrue*, 533
3 F.3d 1035, 1039 (9th Cir. 2008). If the ALJ's credibility finding is
4 supported by substantial evidence in the record, "the court may not
5 engage in second-guessing." *Thomas*, 278 F.3d at 959; *Fair*, 885 F.2d
6 at 604 ("credibility determinations are the province of the ALJ").

7 The ALJ thoroughly summarized the medical evidence and
8 Plaintiff's testimony relevant to the period during which Plaintiff
9 was insured. He specifically noted Plaintiff's testimony that she
10 could no longer work due to neck and low back pain. (Tr. 21.)

11 An ALJ cannot be required to believe every allegation of
12 disabling pain, or else disability benefits would be
13 available for the asking, a result plainly contrary to 42
14 U.S.C. § 423 (d)(5)(A). . . . This holds true even where
15 the claimant introduces medical evidence showing that he
has an ailment reasonably expected to produce some pain;
many medical conditions produce pain not severe enough to
preclude gainful employment.

16 *Fair*, 885 F.2d at 603. Although an adjudicator may not reject a
17 claimant's extreme symptom complaints solely on a lack of objective
18 medical evidence, the medical evidence is a relevant factor to
19 consider. *Social Security Ruling (SSR)* 96-7p.

20 Here, the ALJ found the objective medical evidence did not
21 support Plaintiff's allegations of disabling pain. Referencing
22 medical reports, he found MRI results revealed no cord compression,
23 and neurological findings revealed symmetrical coordination,
24 strength and reflexes, intact sensation, no muscle atrophy, and no
25 report of radicular symptoms. (Tr. 22.) He noted Plaintiff was
26 never a candidate for surgical intervention, and no treating medical
27 provider opined she was totally disabled. (*Id.*) These findings
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1 are supported by substantial evidence, cited in his decision.

2 Significantly, clinic records indicate Plaintiff rarely sought
3 services when visiting the doctor. She reported acceptable pain
4 levels at times (even when laboratory results indicated non-
5 compliance with dosage prescribed), had normal exams, and primarily
6 requested prescription refills at her appointments. (See e.g., Tr.
7 116, 161, 164, 168, 179, 182, 201, 206-07, 212, 216.) In December
8 2005, her treatment provider opined her back condition limited her
9 to light level work with "proper therapy," and noted her most
10 limiting condition was hepatitis C fatigue. (Tr. 139.) At the time
11 she was also taking narcotics pain medication and muscle relaxants
12 under a medication management contract. (Tr. 134-36.)

13 In addition to a lack of objective medical evidence to support
14 a finding of disabling symptoms, the ALJ gave other "clear and
15 convincing" reasons for his credibility findings. He referenced
16 Plaintiff's testimony that she left her last job for "reasons
17 unrelated to disability," that she had performed well at her job and
18 required no special accommodation for her back or neck. (Tr. 21.)
19 The ALJ noted Plaintiff's history of conservative and effective
20 medical treatment, and found reports of her positive response to
21 medication, physical therapy and home exercise were inconsistent
22 with her allegations of disabling back pain. (Tr. 21.) He also
23 reasoned she was capable of independent living and participated in
24 a variety of activities of daily living and she was taking college
25 courses on line, regularly socializing and attending church. (Tr.
26 21-22.) These are specific, "clear and convincing" reasons to
27 support adverse credibility findings. *Tommasetti*, 533 F.3d at 1040.

28 Finally, the ALJ referenced reports from Plaintiff's treatment

1 providers that she was discharged from their care due to misuse of
2 her narcotic prescriptions. (Tr. 13.) A claimant's inconsistencies
3 about substance abuse support an adverse credibility findings. See,
4 e.g., *Thomas*, 278 F.3d at 959; see also *Verduzco v. Apfel*, 188 F.3d
5 1087, 1090 (9th Cir. 1999). As noted by the ALJ, Plaintiff insisted
6 she was taking her pain medication as directed, (Tr. 19), and during
7 hearing testimony she denied being prescribed narcotics other than
8 methadone. (Tr. 383.) However the medical records and the
9 psychological evaluations from 2005 through 2007 report muscle
10 relaxants and pain killers as being prescribed and monitored
11 consistently. Specifically, treating nurse practitioners at two
12 clinics recorded their concerns regarding drug misuse.

13 The record includes her 2005 medication management contract
14 with the Community Health Association of Spokane (CHAS) which lists
15 her medication as methadone (one every 6 hours), Lorazepam (one a
16 day) and Soma (three per day). (Tr. 134-36.) In August 2006, the
17 CHAS treatment provider met with Plaintiff to discuss his concerns
18 regarding prescription misuse, at which time she terminated the
19 contract and service was discontinued. (Tr. 182-83.) Plaintiff
20 testified she canceled the medication contract because her treatment
21 provider threatened her about her medication. (Tr. 382.)

22 She resumed treatment at People's Clinic in August or September
23 2006, at which time the treatment provider recorded her medications
24 as Soma, methadone, Lorazepam. (Tr. 195.) In January 2007, nurse
25 practitioner Sandy Forsman reported Plaintiff was narcotic dependent
26 and needed to wean off high levels of medication for her "mild spine
27 disease," which recent MRI's indicated was improving. (Tr. 198.)
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1 At that time Plaintiff was prescribed Lorazepam, methadone and Soma.
2 A July 2007 note from Nurse Forsman indicates Plaintiff came in for
3 prescription refills, but her blood tests were negative for opiates
4 and benzodiazepines, she had run out of methadone two days early,
5 and the prescribed Lorazepam had addictive potential and street
6 value. (Tr. 214.) On August 16, 2007, Nurse Forsman reported
7 Plaintiff was not taking the medications as directed and refused to
8 give her Lorazepam. She prescribed methadone and Soma. (Tr. 216.
9 Plaintiff was discharged from the clinic that day. (*Id.*) However,
10 at the hearing Plaintiff asserted she was not prescribed or using
11 Lorazepam, and the laboratory tests were wrong. (Tr. 383.)

12 The record also shows Plaintiff attended mental health
13 counseling sessions from April to September 2007. The discharge
14 report from Catholic Charities indicates Plaintiff's progress was
15 minimal after three sessions, and she was "primarily seeking pain
16 killers/lorazepam." (Tr. 327.) The ALJ reasonably considered these
17 inconsistencies between Plaintiff's statements, observations of
18 treatment providers, and the clinical records as a basis for his
19 adverse credibility findings.¹ The documented concerns about drug
20 misuse from Plaintiff's two primary treatment providers and her
21 mental health counselor constitute substantial evidence to support
22 the ALJ's credibility findings.

23 The ALJ did not err in discounting Plaintiff's subjective
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25 ¹ It is noted on independent review that emergency room
26 records submitted November 1, 2007, indicate Plaintiff visited at
27 three hospitals between September and November 2007, seeking pain
28 medication for back and neck pain. (Tr. 341-45, 354-63.)

1 complaints and medical source opinions based on her unreliable self-
2 report. The evidence in its entirety was rationally interpreted to
3 support a finding that the severity and intensity of Plaintiff's
4 pain and limitation complaints are not credible.

5 **B. Step Two**

6 Plaintiff argues the ALJ erred when he found her diagnosed
7 hepatitis C and pain disorder were not severe. (Ct. Rec. 14 at 11.)
8 She asserts her subjective symptom complaints are sufficient to
9 establish severity, and also argues the ALJ improperly rejected Dr.
10 Dalley's assessment of marked limitations which, if credited, would
11 support a finding of severe pain disorder.

12 At step two of the sequential evaluation, the ALJ determines
13 whether Plaintiff suffers from a "severe" impairment, *i.e.*, one
14 which has more than a slight effect on the claimant's ability to
15 work. To satisfy step two's requirement of a severe impairment, the
16 claimant must prove the existence of a physical or mental impairment
17 by providing medical evidence consisting of signs, symptoms, and
18 laboratory findings; the claimant's own statement of symptoms alone
19 will not suffice. 20 C.F.R. §§ 404.1508, 416.908. The effects of
20 all symptoms must be evaluated on the basis of a medically
21 determinable impairment which can be shown to be the cause of the
22 symptoms. 20. C.F.R. §§ 404.1529, 416.929. Once medical evidence
23 of an underlying impairment has been shown, medical findings are not
24 required to support the alleged severity of pain. *Bunnell*, 947 F.2d
25 at 345.

26 The Commissioner has passed regulations which guide dismissal
27 of claims at step two. Those regulations state an impairment may be
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1 found to be not severe *only* when evidence establishes a "slight
2 abnormality" on an individual's ability to work. *Yuckert v. Bowen*,
3 841 F.2d 303, 306 (9th Cir. 1988) (*citing* SSR 85-28). The step two
4 inquiry is a *de minimis* screening device to dispose of groundless or
5 frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137, 153-154. A
6 mental impairment generally is considered non-severe for purposes of
7 step two if the degree of limitation in the three functional areas
8 of activities of daily living, social functioning, and
9 concentration, persistence or pace is rated as "none" or "mild" and
10 there have been no episodes of decompensation. 20 C.F.R. §§
11 404.1520a(d)(1), 416.920a(d)(1).

12 In determining whether a claimant has a severe impairment, the
13 ALJ evaluates the medical evidence submitted and must explain the
14 weight given to the opinions of accepted medical sources in the
15 record. The regulations distinguish among the opinions of three
16 types of accepted medical sources: (1) sources who have treated the
17 claimant; (2) sources who have examined the claimant; and (3)
18 sources who have neither examined nor treated the claimant, but
19 express their opinion based upon a review of the claimant's medical
20 records. 20 C.F.R. §§ 404.1527, 416.927. A treating physician's
21 opinion carries more weight than an examining physician's, and an
22 examining physician's opinion carries more weight than a non-
23 examining reviewing or consulting physician's opinion. *Benecke v.*
24 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81
25 F.3d 821, 830 (9th Cir. 1995), "As is the case with the opinion of a
26 treating physician, the Commissioner must provide 'clear and
27 convincing' reasons for rejecting the uncontradicted opinion of an
28 examining physician." *Lester*, 81 F.3d at 830 (citation omitted).

1 If the opinion is contradicted, it can only be rejected for specific
2 and legitimate reasons that are supported by substantial evidence in
3 the record. *Andrews*, 53 F.3d at 1043. The testimony of a non-
4 examining medical expert by itself cannot be considered substantial
5 evidence that supports the rejection of an examining physician.
6 *Lester*, 81 F.3d at 831. Nurse practitioners and mental health
7 therapists acting independently are not "acceptable medical sources"
8 under the Regulations; however, as "other sources," their opinions
9 as to the effects of impairments on a claimant's ability to work
10 must be considered and the weight given explained. 20 C.F.R. §
11 404.1513(d); 416.913(d).

12 Historically, the courts have recognized conflicting medical
13 evidence, the absence of regular medical treatment during the
14 alleged period of disability, and the lack of medical support for
15 doctors' reports based substantially on a claimant's subjective
16 complaints of pain as specific, legitimate reasons for disregarding
17 a treating or examining physician's opinion. *Flaten v. Secretary of*
18 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*,
19 885 F.2d at 604.

20 1. Dr. Dalley's Psychological Evaluation

21 Plaintiff argues assessments of "marked" limitations by
22 examining psychologist Mahlon Dalley, Ph.D., were not properly
23 rejected and are sufficient to establish a severe mental impairment
24 at step two. (Ct. Rec. 14 at 11.) Plaintiff was evaluated in
25 November 2006, and May 2007; at both evaluations objective
26 psychological testing was administered. (Tr. 244-52, 259-68.) The
27 clinical assessments were conducted by Abigail Osborne-Elmer, M.S.,
28 (Licensed Mental Health Counselor) and authorized and adopted by Dr.

1 Dalley. (Tr. 252, 268.) Pain disorder, NOS, was diagnosed in 2006,
2 with markedly severe pain complaints, and marked functional
3 limitations in her ability to relate appropriately to co-workers and
4 supervisors and tolerate pressures and expectation of a normal work
5 setting. (Tr. 245-46.) In 2007, pain disorder and borderline
6 intellectual functioning were diagnosed. Marked limitations were
7 noted in the same areas as in 2006. (Tr. 260-61.) In 2006,
8 Plaintiff reported taking Soma, methadone and Lorazepam; in 2007,
9 she reported taking Soma and methadone. (Tr. 248, 263.)

10 Although the ALJ did not reject the Elmer/Dalley finding that
11 Plaintiff tested in the borderline to low average intellect range,
12 he concluded the evidence in its entirety showed her IQ level did
13 not pose more than minimal limitations on her ability to do work-
14 related activities. (Tr. 19.) As the Ninth Circuit has emphasized,
15 the ALJ is not required to recite specific words in rejecting
16 medical opinions. *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir.
17 1989.) On review, the court can read the adjudicator's summary of
18 the evidence and draw inferences. *Id.* Here, in his summary of the
19 psychologists' reports at step two, the ALJ referenced test results
20 and observations by the clinician that were inconsistent with a
21 finding of more than a "mild" mental limitation. Specifically he
22 noted Trails A and B test scores in the normal to mild impairment
23 range, and the "mild to moderate" results of her Mini-Mental Status
24 Examination, all of which indicated she was able to think
25 abstractly, had an average mental control and fund of general
26 information and was not delusional. (Tr. 18.) He also summarized
27 evidence of Plaintiff's independent daily activities, on-line
28 university course work at a seminary school, regular socialization

1 at church and with friends, and past work at skilled and semi-
2 skilled jobs. (Tr. 18-19, 22, 107, 264-68, 379.) From these
3 detailed summaries, the court can draw inferences consistent with
4 the ALJ rejection of Dr. Dalley's assessment of "moderate to marked"
5 limitations in mental functioning. Further, at step four, the ALJ
6 specifically rejected the functional limitations on Dr. Dalley's
7 form report as "inconsistent with the results of psychological
8 testing, including testing performed by Dr. Dalley himself in
9 November of 2006 and May of 2007," which were fully discussed at
10 step two. Finally, credibility is a proper factor to consider when
11 evaluating medical evidence. *Webb v. Barnhart*, 433 F.3d 683, 688
12 (9th Cir. 2005). As discussed above, the ALJ properly discounted
13 Plaintiff's self-reported disabling symptoms. The record in its
14 entirety supports the ALJ's rejection of Dr. Dalley's conclusions
15 that Plaintiff's mental function caused more than mild limitations
16 in her ability to perform work activities.

17 2. Duty to Develop Record

18 Plaintiff also argues that without medical expert testimony and
19 consultative examinations purchased by the Commissioner, the ALJ's
20 step two and credibility findings are not supported by substantial
21 evidence. She asserts remand is necessary to develop the record.
22 (Ct. Rec. 14 at 13-14.)

23 Although it is within the ALJ's discretion to develop the
24 record if he determines additional evidence (including medical
25 expert testimony) is necessary to resolve a conflict or clear up any
26 ambiguity in the record, the decision to call a medical expert for
27 additional evidence on the nature and severity of impairments is
28 required only "[w]hen . . . in the opinion of the [ALJ] or the

1 Appeals Council the symptoms, signs and laboratory findings reported
2 in the case record suggest that a judgment of equivalence may be
3 reasonable." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir.
4 2001); *SSR 96-6p*. Here, the medical records do not suggest
5 reasonably that Plaintiff meets a Listing, and she offers no
6 plausible theory of equivalency. See *Sullivan v. Zebly*, 493 U.S.
7 521, 530-31 (1990). Further, the fact that a medically determinable
8 condition exists does not automatically mean the symptoms are
9 "severe," or "disabling" as defined by the Social Security
10 regulations. See e.g. *Edlund*, 253 F.3d at 1159-60; *Fair*, 885 F.2d
11 at 603; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). As
12 discussed above, the ALJ reasonably rejected the alleged severity of
13 Plaintiff's subjective symptom and pain complaints, after finding
14 them inconsistent with her level of daily activity and not entirely
15 credible. In addition, the ALJ found Plaintiff did not require
16 treatment for hepatitis, and tests did not reveal impaired liver
17 function. Indeed, records from CHAS medical clinic detail symptoms
18 and tests run to assess her hepatitis C. Liver function tests were
19 "close to normal" over the years, and Plaintiff reported never
20 having significant abdominal pain or bloating, jaundice, bleeding.
21 She did report "troubling fatigue" when she was working four ten-
22 hour days, and fatigue that persisted after she stopped working.
23 (Tr. 123.) In September 2006, when she started at People's Clinic,
24 she reported no hepatitis-related fatigue. (Tr. 194.) At the
25 hearing, Plaintiff reported she had no hepatitis symptoms except
26 fatigue. (Tr. 378.) The ALJ properly considered her self-reported
27 daily activities (including doing her household chores, cooking,
28 shopping, taking on-line classes, visiting with friends, and

1 attending church) and factored them into his evaluation and
2 conclusion that Plaintiff did not meet her burden to show hepatitis
3 caused more than minimal effect on her ability to work. (Tr. 22.)
4 The evidence is neither ambiguous nor inadequate for a reasonable
5 evaluation of equivalence. The ALJ was not obliged to call a
6 medical expert where, as here, there is no issue of Listing
7 equivalence.

8 Regarding the need for an agency purchased consultative
9 examination, the Commissioner has "broad latitude in ordering a
10 consultative examination." *Diaz v. Secretary of Health and Human*
11 *Services*, 898 F.2d 774, 778 (10th Cir. 1990). Consultative exams
12 are purchased to resolve conflicts or ambiguities "if one exists."
13 20 C.F.R. § 404.1519a(a)(2). However, there must be sufficient
14 objective evidence in the record to suggest the "existence of a
15 condition which could have a material impact on the disability
16 decision." *Hawkins v. Chater*, 113 F.3d 1162, 1167 (10th Cir. 1997).
17 Here, the ALJ properly rejected the severe mental limitations
18 assessed in the Elmer/Dalley form report as inconsistent with the
19 narrative psychological evaluation, results from objective testing,
20 and other evidence in the record. The record supports the ALJ's
21 "clear and convincing" reasons, including Plaintiff's own statements
22 to her mental health provider that her bouts of depression were
23 "time-limited," and occurred monthly for about three days, that she
24 did not want to attend counseling unless they could help her get
25 pain medication, and that the only reason she attended counseling
26 was to satisfy state agency requirements. (Tr. 264-67, 317, 331,
27 337.) Plaintiff has failed to present evidence to suggest her
28 mental condition had a material impact on the ALJ's disability

1 determination; therefore, the ALJ's reasonably determined a
2 consultative examination was not warranted.

3 The ALJ did not err when he found Plaintiff's hepatitis C and
4 mental disorders did not cause more than minimal effect on her
5 ability to do work activities. His step two findings are supported
6 by substantial evidence.

7 **C. Hypothetical Question**

8 Plaintiff contends the ALJ erred by presenting an incomplete
9 hypothetical to the VE. (Ct. Rec. 14 at 17-19.) Based on
10 hypothetical questions posed by the ALJ, the VE testified Plaintiff
11 could perform her past relevant work as a casino coin machine
12 repairer, electronic assembler, casino cashier and hostess,
13 classified as light work as described and performed by Plaintiff.
14 (Tr. 107, 391-92, 394, 397-98.)

15 The ALJ may rely on vocational expert testimony if the
16 hypothetical presented to the expert includes all functional
17 limitations supported by the record and found credible by the ALJ.
18 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005). In his
19 first hypothetical, the ALJ included all exertional limitations
20 supported by the medical record and Plaintiff's credible testimony.
21 Plaintiff asserts the ALJ should have included "sedentary
22 limitations noted in the DSHS physical capacity evaluations done for
23 GAU/GAX." (Ct. Rec. 14 at 18.) However, the ALJ specifically
24 rejected these limitations as (1) inconsistent with the record in
25 its entirety, including MRI reports, and (2) based on Plaintiff's
26 unreliable self-report. (Tr. 23.) These are legally sufficient
27 reasons to reject the opinions of nurse practitioners working
28 independent of an acceptable medical source. See *Gomez v. Chater*,

1 74 F.3d 967, 971 (9th Cir. 1996). Further, the final determination
2 regarding Plaintiff's ability to perform basic work is the sole
3 responsibility of the Commissioner, and no special significance is
4 given to a medical source opinion on issues reserved to the
5 Commissioner. 20 C.F.R. §§ 404.1527(e), .1546, 416.927(e), .946;
6 SSR 96-5p.

7 In a third hypothetical,² the ALJ added the following non-
8 exertional limitations reflected in Dr. James Bailey's narrative
9 psychological evaluation:³

10 [S]low, psycho motor speed and digit symbol and poor
11 calculation, arithmetic and poor matrix reasoning which

12 ² The ALJ's second hypothetical assumed Plaintiff's testimony
13 was entirely credible; the VE opined her complaints precluded work.
14 (Tr. 394-95.)

15 ³ The court notes on independent review that in a June 2006,
16 psychological evaluation check box form, Dr. Bailey assessed two
17 "marked" limitations: (1) "ability to perform routine tasks," and
18 (2) "ability to respond appropriately to and tolerate the pressures
19 and expectations of normal work setting," but indicated these were
20 not expected to last more than 12 months. (Tr. 233-34.) See 20
21 C.F.R. §§ 404.1509, 416.909 (an impairment is not disabling unless
22 it is expected to result in death or last for a continuous period of
23 at least 12 months). In May of 2007, Dr. Dalley identified only the
24 second limitation assessed by Dr. Bailey as still existing. (Tr.
25 261.) As discussed above, the ALJ properly rejected this degree of
26 severity as inconsistent with the objective testing (overall
27 performance in the low average range) and the record in its
28 entirety. (Tr. 23, 261, 266.)

1 were scores of the lower end of test results in WAIS III
2 are likely due to the effects of narcotic like medication.

3 Otherwise [Dr. Bailey] stated activities of daily
4 living mostly independent. Socially she relates very -
5 fairly well and is well groomed. Concentration and pace
6 were limited by what I just referred to as slow psycho
7 motor speed and poor calculation as well as some
8 limitations and non-verbal reasoning as seen in the matrix
9 reasoning.

10 (Tr. 397.)

11 The VE opined these mental limitations (even with the effects
12 of pain medication) would cause minimal effect on her ability to do
13 the past work described, specifically noting that concentration,
14 persistence and pace were not limited by the effects of narcotics.

15 (Tr. 397-98.) In response to questioning by Plaintiff's counsel,
16 the VE stated it was not unusual for people in the workplace to
17 "have to deal with the side effects of pain medication." (Tr.
18 398.) Therefore, Dr. Bailey's observations regarding the effects
19 of narcotic medication on Plaintiff's mental capacity to perform
20 work were considered by the VE and addressed by the ALJ in his step
21 four findings. (Tr. 23.)

22 Because the ALJ was not required to include properly rejected
23 limitations assessed by Dr. Dalley and Plaintiff's treatment
24 providers, the hypotheticals relied upon by the VE reflect
25 limitations supported by the record and credible testimony. In
26 addition, limitations due to pain and medication, were presented in
27 the hypothetical. Therefore, the ALJ's findings at step four are
28 based on substantial evidence, and free of legal error. *See Parra*
v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007), *cert denied* 128 S.Ct.
1068 (2008).

CONCLUSION

The ALJ thoroughly detailed the medical evidence in the record and properly evaluated medical source opinions. He properly assessed Plaintiff's ability to perform work activities. His detailed credibility findings are "clear and convincing." His determination of non-disability is based on substantial evidence and free of legal error. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is **DENIED;**

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is **GRANTED;**

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant, and the file shall be **CLOSED**.

DATED April 24, 2009.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE